United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-6145

Docket No. T-6462
76-6145

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

LOREN E. DAMON, JR., by his
next friend, VIVIAN F. DAMON

Appellant

v.

SECRETARY OF HEALTH, EDUCATION
AND WELFARE

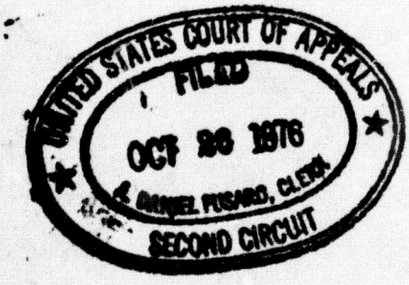
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 74-161

APPENDIX



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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Loren E. Damon, Jr., a minor, by his next friend, Vivian F. Damon	:	Civil Action
v.	:	File No. 74-161
Secretary of Health, Education and Welfare	:	

OPINION AND ORDER

Plaintiff Loren E. Damon, Jr., a minor, seeks judicial review pursuant to 42 U.S.C. §405(g) of a final determination of the Secretary of Health, Education and Welfare that he is ineligible for child's social security insurance benefits as the adopted son of Vivian Damon, a recipient of old-age insurance benefits. Although Loren, now fifteen years old, has lived with Mrs. Damon and her husband since his infancy, he has been their foster child for most of this time. The adoption proceedings did not become final until August 7, 1972, approximately nine months after Mrs. Damon became entitled to social security benefits in November, 1971. The timing of the adoption is unfortunate but crucial to this suit.

If the adoption had occurred prior to November 1, 1971, Loren's entitlement to child's insurance benefits would be undisputed, since the adopted minor child of an individual entitled to old-age benefits need only apply for child's benefits, 42 U.S.C. §402(d)(1)(A), and show that he is unmarried, 42 U.S.C. §402(d)(1)(B), and living with the adopting parent

at the time of application. 42 U.S.C. §402(d)(3). However, because Loren was adopted after Mrs. Damon became entitled to old-age benefits in November, 1971, he is required to show also that she was providing at least one-half of his support during the year immediately prior to her initial entitlement. 42 U.S.C. §402(d)(8). The undisputed facts in the case show that during the year in question, the State of Vermont made foster care payments to the Damons on Loren's account which were far greater than one-half the total amount of money spent by them for Loren in that same period.[1/] The Secretary determined that the foster child payments constituted support from the state, not from the plaintiff's foster parents. On that basis, the plaintiff was found to be ineligible for children's benefits at every level of administrative appeal.[2/]

The case came before this Court initially on cross-motions for summary judgment. The critical issue presented on agreed facts was the propriety of the Secretary's determination that foster care payments are furnished by the state, not by the foster parents. A constitutional challenge to the "one-half support" requirement of §402(d)(8) was alternatively raised on equal protection grounds. Finding the record incomplete on the question of the ownership, control, and income tax aspects of foster care payments, the Court, by an opinion and order dated July 30, 1975, remanded the case to the Secretary for further administrative proceedings on these questions.

Following remand, a supplemental hearing was held in Burlington, Vermont, before Administrative Law Judge

Henry A. Milne on December 12, 1975, and testimony was taken of Mrs. Emma Remick, Supervisor of Licensing for the Vermont Foster Care Program. Based upon Mrs. Remick's testimony and upon the Foster Care Regulations of the Vermont Department of Social Welfare and Rehabilitation Service, which were placed into evidence, Judge Milne concluded that foster care payments in Vermont are not "income" to foster parents, the foster parents obtain no property right in the payments, and the funds cannot be considered as furnished by the parents. On that basis, Judge Milne reaffirmed the Secretary's previous determination that the plaintiff was not entitled to child's insurance benefits, and the Appeals Council adopted this conclusion in an opinion dated March 22, 1976.

The case is again before the Court on cross-motions for summary judgment. No material facts are disputed, and two questions of law remain. The Court must determine first whether the Secretary has properly interpreted the provisions of §402 (d)(8) and the administrative regulations which accompany it, and if so, we must then determine whether the statute and regulations can withstand constitutional attack. A resolution of these questions is made more difficult because the facts of the case engender sympathy for the claimant and the adoptive parent, and if simple fairness alone is considered, it would seem that the child should prevail. Nevertheless, the Court concludes, after carefully reviewing the entire record of administrative proceedings, that the Secretary's determination

is supported by substantial evidence, is consistent with the governing law, and does not deprive the plaintiff of equal protection.

The "purpose of children's benefits is to provide at least some measure of income and security to those who have lost a wage-earner on whom they depended," Davis v. Richardson, 342 F. Supp. 588, 593 (D. Conn. 1972), and in implementing this purpose and enforcing the Act, the judiciary is not to take a begrudging approach. On the contrary:

> The inherent nature and purpose of the Social Security Act is such that the Courts must naturally be disposed to contrue it liberally, and if legally proper, in favor of the party seeking its benefits. (citation omitted) This liberal perspective also applies to the award of children's benefits . . . . Ziskin v. Weinberger, 379 F. Supp. 124, 126 (S.D. Ohio, W.D. 1973).

So liberal is the approach we are to take that "obvious exceptions must be read into the statute when to do so is necessary to effectuate its purpose." Haberman v. Finch, supra., 418 F.2d at 667; see also, Eisenhauer v. Mathews, No. 75-6047 (2d Cir. April 15, 1976) Slip op. 3237, 3241 ("the Social Security Act is to be accorded a liberal application in consonance with its remedial and humanitarian aims.") With these considerations in mind, the Court's natural inclination is to favor the plaintiff's position because of his close relationship with Mrs. Damon in the years prior to her retirement as a wage-earner.

From the time he was placed in the Damon home at the age of one and a half years, Loren was treated as a natural son.

Mrs. Damon testified at the initial administrative hearing on February 11, 1974 that Loren "(c)ouldn't have been our own any more than if we'd a, I'd a given birth to him."[3/] This statement is supported by the testimony of Mrs. Pemick at the Supplemental Hearing on December 12, 1975, and is not contradicted by any findings of the Secretary or his agents. There is also undisputed testimony that the Damons had desired to adopt Loren from the time he was two years old and had attempted to do so, but were deterred on a number of occasions by Welfare Department officials who advised them that adoption was unnecessary, since Loren would never be removed from their home. The Damons evidently relied upon this advise; but when the Welfare Department did attempt to take Loren from them in November, 1971--an action which Mrs. Remick acknowledged "wasn't a very wise thing to do"--they then promptly insisted upon adoption, obtained an attorney, and initiated legal proceedings.

While we do not view these facts as indicating any sort of "equitable adoption" prior to November, 1971, we do consider they show a relationship between Loren and his foster parents which was as close as that of any child to natural or adopting parents. In this regard, it would not be unreasonable to grant Loren the same entitlement to Social Security benefits as natural children or children who are adopted prior to a wage-earning parent's retirement.

However, the Social Security Act requires a more particular showing of dependency as a condition of entitlement

to children's insurance benefits, 42 U.S.C. §402(d). A "close relationship" does not suffice in certain circumstances. The presumption of dependency which favors natural and prior-adopted children, 42 U.S.C. §402(d)(3), does not run to children in Loren's situation, who are adopted after their parent's retirement. As previously explained, after-adopted children are "deemed" not to be dependent on their retiring parent, unless they received one-half their support from the parent in the year prior to retirement. 42 U.S.C. §402(d)(8).

The pertinent HEW regulations interpreting this statutory requirement provide in part that:

> A legally adopted child . . . shall be considered to be receiving at least one-half of his support from the insured individual for the year before the applicable time specified in section 202(d)(9)(B)(i) if such individual made a contribution, in cash or kind, to such child's support in each of the 12 months preceding the applicable time and the total of such contributions over the entire 12-month period equaled or exceeded one-half of such child's support for the year. 20 C.F.R. §404.350(b)(2).

"Support" is defined to include:

> . . .food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported. 20 C.F.R. §404.350(c).

"Contributions" means:

> . . .contributions actually provided by the contributor from his own property, or the use thereof, or by the use of his own credit. 20 C.F.R. §404.350(d).

The Court is obligated to give great weight to these interpretations of the Social Security Act by the agency charged with

its administration, since the regulations are not inconsistent with the statute and have not been overturned by Congress. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Lewis v. Martin, 397 U.S. 552, 559 (1970). With this perspective, the Court is constrained to uphold the Secretary's determination that the foster care payments to the plaintiff were not the "property"of his foster parents and were not contributed therefrom.

It is clear from the testimony of Mrs. Remick, the Supervisor of foster care licensing, that foster care payments are not designed as compensation to the parents.[4/] The payments are fixed by regulation according to the needs of the foster child, without regard to the actual services rendered by the foster parents. The Department expects the funds to be spent exclusively for the child and terminates the foster relationship if the funds are expended otherwise.[5/] Mrs. Remick also indicated that foster payments are not treated as "income" for purposes of taxation, and the Department's "Guide to Foster Parents," Part G., states in this regard that:

> The office of the Collector of Internal Revenue, Treasury Department, has advised that all payments received for care of a foster child should not be reported as income on your tax report. On the other hand, the child may not be claimed as an exemption for income tax purposes.

It is true that foster parents exercise a great deal of control over the funds paid to them by the state on behalf of their foster child. Aside from clothing expenditures, which

must be specifically accounted for, the parents may spend the funds in any manner they choose in the foster child's best interests. Obviously, foster parents do not act simply as cash disbursing agents for the state. They are expected to act as surrogate parents and to use the state's funds in a responsible fashion to provide a warm and nurturing environment. Nevertheless, in using the funds to meet the child's basic needs, the foster parents do not acquire the funds as their "property." They may contribute of their own funds, of course, and undeniably their input to the child's well-being is great, but the funds specifically for the benefit of the child are contributed by the state.

It is also significant that the foster care payments were not a source of support to the plaintiff which derived from his mother's status as a wage-earner. The payments were made regardless of the amount of Mrs. Damon's wage-earnings and could have continued even after she had retired from her regular jobs. In contrast to this situation, the stated purpose of the "one-half support" rule in §402(d)(8) is to insure that Social Security benefits are paid to only those children who have "lost a source of support <u>because</u> (a) parent retired." 1972 U.S. Code Cong. & Adm. News p. 5039. (emphasis added). Consequently, though the plaintiff is no longer a foster child and is now dependent upon his adopted parents for all support, he

is unfortunately not in the class of children who are entitled to the benefits of the Social Security system on his mother's account.

Having decided plaintiff's statutory claim in favor of the defendant, the Court must now consider the constitutional question raised.

The plaintiff argues that there is no rational basis to support the Social Security Act's differentiation between one class of children, who are presumed to be dependent and are therefore entitled to benefits, and another class of children who are presumed not to be dependent and are therefore ineligible for benefits. Finding himself in the disfavored class, as a child adopted after his mother became entitled to retirement benefits, the plaintiff contends that he is denied the equal protection of the laws guaranteed to him by the Due Process Clause of the Fifth Amendment.

As this opinion has already suggested, the Court recognizes an element of unfairness which has resulted from the application of §402(d)(8) to the plaintiff in this particular case. Nevertheless, the Court is unable to conclude that this unfairness rises to a level which is violative of the Constitution. In view of recent Supreme Court decisions approving prophylactic provisions similar to that contained in §402(d)(8), we are constrained to hold that the plaintiff has not been denied equal protection.

As no suspect classifications or fundamental rights are involved in this case, the Court's basic posture of review

is necessarily one of deference to the statutory scheme which is challenged. Dandridge v. Williams, 397 U.S. 471, 485 (1970). A statutory classification in the area of social welfare is consistent with equal protection under either the Fifth or Fourteenth Amendments, if it is "rationally based and free from invidious discrimination." Dandridge v. Williams, supra at 487; Richardson v. Belcher, 404 U.S. 78, 81 (1971).

The classification scheme attacked in this case was designed to eliminate the administrative burden and expense of case-by-case inquiry to determine whether the dependency requirement of 42 U.S.C. §402(d)(1)(C) is satisfied for purposes of entitlement to child's benefits. The classifications which have been established are based upon legislative determinations regarding the likelihood of dependency among certain classes of children. Those children which Congress considered most likely to be dependent upon their wage-earning parents (e.g. natural children, step-children, childreny adopted prior to entitlement) are favored with a presumption in that regard. 42 U.S.C. §402(d)(3). As to children adopted after their parents' retirement, Congress was legitimately concerned that adoption might take place solely for the purpose of obtaining additional Social Security benefits, and the presumption against dependency embodied in §402(d)(8) was designed to safeguard against this form of abuse. 1972 U.S. Code Cong. & Adm. News, p. 5039.

As this case illustrates, the statutory classification scheme is not so perfectly drawn as to include all those children

who are dependent upon a retired wage-earner or to exclude all those children who are not. However, the Constitution does not require the legislatures to be absolutely precise. In reviewing legislative classifications of the sort challenged here:

> . . .the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

Weinberger v. Salfi, 422 U.S. 749, 777 (1975).

In Weinberger v. Salfi, the Court upheld against constitutional attack a provision of the Social Security Act which operated to deny survivors' benefits to wives and step-children of a deceased wage-earner who died less than nine months after a marriage was commenced. The nine-month requirement upheld in Salfi, like the "one-half support" requirement challenged here, was designed to safeguard against abuse through legal relationships entered into solely to qualify for Social Security benefits. Citing the standards of Dandridge v. Williams, supra, the Court indicated in Salfi that requirements of this sort are a reasonable means of carrying out legitimate legislative goals at a minimum of administrative expense and burden. Weinberger v. Salfi, supra at 777.

Were it not for the Supreme Court's recent decision in Mathews v. Lucas, 44 U.S.L.W. 5139 (June 29, 1976) the constitutional issue in this case might be more difficult. However, the Court's analysis in Lucas, with the background of cases just discussed, appears to be dispositive of plaintiff's claim.

Lucas involved an equal protection challenge to provisions of the Act which conditioned the eligibility of certain illegitimate children for survivors' benefits upon a showing that the deceased wage-earner was living with or contributing to the support of the child at the time of death. The plaintiffs were illegitimate children who had lived with and been supported by their wage-earning father prior to but not at the time of his death. Like the plaintiff here, they argued that the statutory presumptions of dependency favoring other classes of children, but not themselves, were violative of equal protection. The Court disagreed, holding that the "statutory classifications are permissible . . . because they are reasonably related to the likelihood of dependency at death."

The Court first pointed out that:

> . . .presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

Mathews v. Lucas, supra, at 44 U.S.L.W. at 5143. The Court then concluded that the statutory classifications challenged in that case, which are directly analagous to the classifications

challenged here, were "justified as reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency."

Similar empirical judgments underlie the statutory classifications involved in this case. After-adopted children are not invidiously discriminated against by the Act and are not, like the after-born, illegitimate children in Jiminez v. Weinberger, 417 U.S. 628 (1974), conclusively denied entitlement to Social Security benefits. (See, Mathews v. Lucas, supra, at 5144, distinguishing Jiminez v. Weinberger.) After-adopted children simply are not favored by Congress with a presumption of dependency. They are required instead to prove that such a relationship of dependency existed at the pertinent times.

While a more equitable result might have been reached in this case if Congress had extended the presumption of dependency to after-adopted child in Loren Damon's situation, we cannot say that Congress' failure to do so ". . . is so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry . . . is unwarranted as an administrative exercise." Mathews v. Lucas, supra at 5145.

For the foregoing reasons, the determination of the Secretary of Health, Education and Welfare that Loren Damon is not entitled to child's insurance benefits is denied, and the defendant's motion for summary judgment is granted, and it is

so ORDERED.

Dated at Burlington in the District of Vermont, this 19th day of August, 1976.

/s/ Albert W. Coffrin
Albert W. Coffrin
District Judge

FOOTNOTES

1/ The total expenditures for the plaintiff from November 1, 1970 through October 31, 1971 by Mrs. Damon were computed to be $1,017.97. The State paid $918 to Mrs. Damon in that period as foster child payments. Under a separate method of computation, the Secretary determined that $1,446.50 was available to the plaintiff as support for the year in question (one-sixth the support available to the entire family, composed of Mr.and Mrs. Damon, two natural children, and two foster children). Of that amount, $528.50 was found to have been contributed from the Damon's personal funds, while $918.00 was contributed by the state.

2/ The plaintiff's application for child's benefits was filed June 14, 1972 and was initially denied by a letter dated July 10, 1972. A reconsidered determination by the New York Reconsideration Branch of the Social Security Administration, dated February 5, 1973, also denied the application. Following a hearing held in Burlington on February 11, 1974, the initial and reconsidered determinations were approved by Administrative Law Judge, Albert P. Feldman. The Appeals Council denied plaintiff's request for further administrative review on May 17, 1974, making final the denial of the plaintiff's claim. This action was commenced on June 6, 1974.

3/ Mrs. Damon's testimony, in context, reads as follows:

> Welfare took him from a home of seven children, brought him to me and he was a sick little boy. I made the trip to St. Johnsbury twice a week to take him to a doctor til after he was three years old because he was so, he was malnutrition, his back was crooked, he couldn't use his right arm very much and I spent a lot of time with that little boy till he was about six years old. Then, when he, he gained and he was a real nice looking little boy when he was growing up and we thought just as much of him as we did our own little boy. Couldn't have been our own any more than if we'd a, I'd a given birth to him.

4/ The Vermont statutes define foster care as "care of a child for a valuable consideration in a child-care institution or in a family other than that of the child's parent, guardian or relative." (emphasis supplied). 33 V.S.A. §2752. Section 3410 of the Foster Care Regulations speaks of foster care as being "purchased" only from licensed child-care facilities. Nevertheless, it is clear from the evidence of Mrs. Remick, the only evidence in the case on this point, that foster care services are neither "purchased" nor delivered for "value" in the customary commercial sense of the words. See 9 V.S.A. §§1-201-(32); (44).

5/ Section 3603 of the Foster Care Regulations provides in part that:

> The foster family must have a regular source of income for adequate maintenance of their family group. Foster care payments should not be used to support other members of the household.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Loren E. Damon, Jr., a minor, by his next friend, Vivian F. Damon	:	
v.	:	Civil Action
Secretary of Health, Education and Welfare	:	Filed No. 74-161

ORDER AMENDING OPINION AND
ORDER, DATED AUGUST 19, 1976

The final paragraph of the Court's Opinion and Order, dated August 19, 1976, (p. 13) is hereby amended to read as follows:

For the foregoing reasons, the determination of the Secretary of Health, Education and Welfare that Loren Damon is not entitled to child's insurance benefits is affirmed. The plaintiff's motion for summary judgment is denied, and the defendant's motion for summary judgment is granted, and it is so ORDERED.

Dated at Burlington, in the District of Vermont, this 30th day of August, 1976.

/s/ Albert W. Coffrin
Albert W. Coffrin
District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Loren E. Damon, Jr., a minor, by his next friend, Vivian F. Damon	:	Civil Action
v.	:	File No. 74-161
Caspar Weinberger, Secretary of Health, Education and Welfare	:	

OPINION AND ORDER

Plaintiff in this case seeks judicial review under 42 U.S.C. §405(g) of a final determination that he is ineligible for child's insurance benefits under the Social Security Act. See 42 U.S.C. §402(d). The plaintiff is the adopted son of Vivian Damon, and his eligibility for child's benefits is based upon her participation in the social security system and her current entitlement to retirement benefits under the Act. The Act provides that since the plaintiff was adopted after Mrs. Damon became eligible for retirement benefits, he cannot receive child's benefits unless the primary wage earner, Mrs. Damon, provided more than one-half of his support during the year preceding the month in which she became eligible for social security retirement. 42 U.S.C. §402(d)(8).

It appears that during the year in question the plaintiff was living with the Damons as a foster child, as he had been for nearly ten years, and as a consequence the Damons were paid $918.00 by the Vermont Department of Social Welfare under the foster care program. The issue is how this $918.00

should be treated in determining whether or not Mrs. Damon provided more than one-half the plaintiff's support during the so-called "support year." The position of the Social Security Administration consistently has been that the foster care payments constitute support from a source other than the primary wage earner and that consequently in order to establish that Mrs. Damon provided more than one-half the plaintiff's support she would have to show that she provided more than $918.00 during the support year. The plaintiff argues that the $918.00 should be viewed as contributed by Mrs. Damon and thus that she has provided the requisite support. The plaintiff also claims that the support requirement itself is unconstitutional.

At the administrative hearing held on this matter, the Administrative Law Judge concluded that "the contribution for foster care cannot . . . be considered as a contribution by claimant to the support of the child, but instead claimant must at least equal it." But the record gives no indication as to the reasons supporting this conclusion, and no evidence was introduced on which the Administrative Law Judge could have relied in reaching this conclusion. For example, there is not evidence in the record which shows whether any restraints are placed on the actual spending of the foster child payments, what happens to the surplus in the event that the foster parent provides the requisite care and maintenance but spends less than the allotted amount for the care of the child, how the payments are treated for income tax purposes by foster parents, or any other indicia of

ownership or control of the money which would assist the court in determining how to treat the foster child payments.

The statutory definition of foster care is the "care of a child, for valuable consideration in a child care institution or in a family other than that of the child's parent, guardian or relative," 33 V.S.A. §2752(d)(emphasis added), and the Vermont law requires that a person from whom the state purchases foster care must obtain a license. See Vermont Department of Social Welfare, Licensing Standards for Family Foster Homes and Family Group Homes at 2; Vermont Department of Social Welfare Regulations at 3410-3419, Bulletin No. 73-7. (emphasis added). Taken together, these references seem to indicate that the State compensates foster parents for providing foster care, and that money so earned and spent for the support of the foster child could well be viewed as support provided by the parent. If this court were hearing this case de novo, we would want to learn more about the workings of the foster child program in Vermont so that we could determine whether payments under the program in effect were designed to compensate the parents for services performed as foster parents, or whether the payments were purely for the support of the child. But the court cannot consider this matter de novo. The scope of our review on an appeal of this sort is quite limited, see Atterberry v. Finch, 424 F.2d 36 (10th Cir. 1970), and we are unable to take any new evidence to assist us. Huckabee v. Richardson, 468 F.2d

1380 (4th Cir. 1972). Rather the proper procedure when the review of new evidence is indicated is to remand the case to the Secretary for reconsideration. See Carnevale v. Gardner, 393 F.2d 990 (2d Cir. 1968). Consequently the case is remanded to the Secretary for the taking and consideration of evidence on the nature of the Vermont foster child program and for reconsideration of the issue of treatment of the foster child payments. Such reconsideration shall be accomplished without undue delay.

Dated at Burlington in the District of Vermont, this 30th day of July, 1975.

/s/ Albert W. Coffin
District Judge